

ORIGINAL #9

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )

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)  
Rulemaking to Amend Parts 1, 2, 21 )  
and 25 of the Commission's Rules to )  
Redesignate the 27.5-29.5 GHz )  
Frequency Band, to Reallocate the )  
29.5-30.0 GHz Frequency Band, to )  
Establish Rules and Policies for )  
Local Multipoint Distribution Service )  
and for Fixed Satellite Services )

CC Docket No. 92-297

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To: The Commission

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

REPLY COMMENTS OF PUBLIC SERVICE TELEPHONE COMPANY

Public Service Telephone Company ("Public Service"), by its attorneys, hereby submits its reply comments in response to the Commission's Fourth Notice of Proposed Rulemaking ("Fourth NPRM") in the captioned proceeding. In support hereof, the following is shown:

Statement of Interest

1. Public Service is a wireline local exchange carrier ("LEC") providing landline message telephone service to rural areas in the State of Georgia. In addition, Flint Cable TV, Inc., a wholly-owned subsidiary of Public Service, provides cable television service to rural areas in the State of Georgia. Thus, Public Service has a direct interest in any Commission action that would limit the eligibility of LECs and cable operators to provide Local Multipoint Distribution Service ("LMDS").

The Commission Should Not Limit The Ability  
Of LECs And Cable Companies To Acquire LMDS Licenses

2. In the Fourth NPRM, the Commission seeks comment on

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whether to restrict the eligibility of incumbent LECs and cable operators to acquire LMDS licenses in their service areas, or whether to restrict them in the use of LMDS spectrum. Comment on this issue has been requested because the record in this proceeding was developed prior to enactment of the Telecommunications Act of 1996 ("the 1996 Act"), and the Commission considers it important to obtain specific comment on how Commission policies toward LMDS eligibility would best promote the competitive objectives of the 1996 Act. Fourth NPRM, Paragraph No. 105.

3. Previously in this proceeding, the Commission held that no statutory or regulatory provision prohibited LECs and cable operators from acquiring LMDS licenses in their wireline or cable television service areas. See First Notice of Proposed Rulemaking (CC Docket No. 92-297), 8 FCC Rcd. 557 (1993) ("First NPRM"); Third Notice of Proposed Rulemaking (CC Docket No. 92-297), 11 FCC Rcd. 53 (1995) ("Third NPRM"). Most parties addressing the eligibility issue in response to the First NPRM and the Third NPRM supported unrestricted eligibility for LECs and cable operators. Fourth NPRM, Paragraph No. 110.

4. In response to the Fourth NPRM, twelve commentators argue in favor of an eligibility or use restriction generally citing competitive concerns, claiming that LECs and cable operators will have an incentive to suppress the development of LMDS by warehousing the spectrum.<sup>1</sup>

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<sup>1</sup> See Comments of WebCel Communications, Inc., MCI Telecommunications Corporation, Rio Vision, Incorporated, ComTech Associates, Inc., Opportunities Now Enterprises, Inc., SkyOptics,

5. For the record, Public Service opposes any form of eligibility or use restriction that would prevent or limit the participation of LECs and cable operators in LMDS. The positions of the twelve commentators supporting restrictions are not well founded.

6. First, LMDS will be licensed on a Basic Trading Area ("BTA") basis with the licenses awarded through the use of auction procedures. Regardless of the identity of the winner, the successful LMDS bidder will pay what the market dictates the license is worth, which could be many millions of dollars. Given the high cost of license acquisition, it defies logic to suggest that LECs and cable companies (if they are successful bidders) will incur such expenditures only to warehouse the LMDS spectrum instead of putting the spectrum to maximum use. Indeed, warehousing the spectrum would be a vain act because it would not forestall the development of competition in the delivery of wireline local exchange service or in the delivery of video programming service.

7. Newly-enacted Section 251 of the Communications Act accords the competitors of LECs the right to purchase unbundled network elements and to purchase local exchange service at wholesale rates, the result being to revolutionize competition in the local exchange market in the near future. In addition, cable operators are already facing increasing competition in the delivery

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Inc., ICE-G, Inc. d/b/a International Communications Electronics Group, CellularVision USA, Inc., Allied Associated Partners, L.P. and GELD Information Systems, Competitive Policy Institute, and CellularVision Technology and Telecommunications, L.P.

of multichannel video programming from such outlets as Direct Broadcast Satellite Service and Multichannel Multipoint Distribution Service; and newly-enacted Section 651 of the Communications Act actively encourages LEC entry into the video programming market. Simply put, LMDS eligibility restrictions are unnecessary to promote competition in the provision of local exchange service or the provision of video programming service.

8. Second, eligibility or use restrictions would contravene the intent of Congress in enacting the 1996 Act, which favors open entry. Section 301(b)(3) of the 1996 Act amends Section 623(1)(1) of the Communications Act to define "effective competition" in cases where a LEC or its affiliate "offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator. In describing this provision, the Conference Report on the 1996 Act states that "'[b]y any means' includes any medium (other than direct-to-home satellite service) for the delivery of comparable programming, including MMDS, LMDS, and open video systems, or a cable system." Conference Report No. 104-458, 104th Congress, 2d Sess. (1995) at 170 (emphasis added). Thus, eligibility and use restrictions are not needed to promote competition in the video programming marketplace.

9. Third, given the foregoing considerations, it seems quite clear that eligibility or use restrictions would be contrary to law and, in any event, need not be imposed on LECs and cable companies in connection with LMDS. For an eligibility or use restriction to

withstand judicial review, it must bear some reasonable relationship to development of a competitive market. Cf. Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 (D.C. Cir. 1991). Any exclusionary restriction imposed on LECs or cable companies in connection with the licensing or use of LMDS to provide telephone or video programming service within their existing service areas must be supported by specific documentary evidence in the record, Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752, 764 (6th Cir. 1995); and such evidence is lacking here.

10. Of the twelve commentators supporting such restrictions, only one, WebCel Communications, Inc. ("WebCel"), even attempted to submit some form of documentary evidence to support its position. The so-called evidence submitted by WebCel consists of a paper prepared by Kenneth C. Baseman ("the Baseman Paper"). As an initial matter, the Baseman Paper is not entitled to probative weight because it is not supported by either an affidavit or a declaration under penalty of perjury. On the merits, the Baseman Paper relies upon broadly stated "findings" and generalized conclusions regarding the so-called need to prevent LECs and cable companies from obtaining LMDS licenses in their existing service areas. As such, the Baseman Paper is similar to the General Accounting Office report relied upon by the Commission, and found inadequate by the Court, in the Cincinnati Bell Telephone Co. case to support former Section 24.204 of the Rules, the cellular/broadband PCS cross-ownership rule. The Baseman Paper supplies no support for imposing eligibility or use restrictions.

**Conclusion**

11. Public Service opposes any form of eligibility or use restriction that would prevent or limit the participation of LECs and cable operators in the provision of LMDS, and encourages the Commission to adopt an open-entry market structure for this new service. The imposition of eligibility or use restrictions would be inappropriate as a matter of policy and, since unsupported by the record in this proceeding, contrary to law.

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**Public Service Telephone  
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By: 

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Dated: August 22, 1996

### Certificate of Service

I hereby certify that I am an attorney with the law offices of Blooston, Mordkofsky, Jackson & Dickens, and that on this 22nd day of August, 1996, I caused to be mailed by first class United States mail, postage prepaid, a copy of the foregoing **"Reply Comments of Public Service Telephone Company"** to the following:

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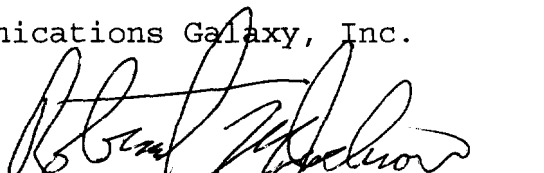
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